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| Don D. Cha 547 Buena Vista Road Golden, CO 80401 | | | EXAMINER VALENTI, ANDREA M | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/528,110

Applicant(s)

BISSENETTE ET AL.

Examiner

ANDREA M. VALENTI

Art Unit

3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 31 August 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 216-219, 221 and 223-233 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 216-219, 221 and 223-233 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 August 2009 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Objections

Claim 233 is objected to because of the following informalities:

Claim 233, the claim modifier indicates "(Currently Amended)", but there does not appear to be an amendment to the claim. It should read --previously presented--

Appropriate correction is required.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 216-219,221 and 223-233 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim1-32 of copending Application No. 12/073,984. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims

teach subject matter of a chamber including an open upper portion and a closed lower portion for storing a liquid nutrient solution; a first surface covering the closed lower portion of the chamber; a second surface; wherein at least a portion of the soilless growth medium is located between the first surface and the second surface; and a pump located in the closed lower portion of the chamber, the pump including an input for receiving the liquid nutrient solution from the closed lower portion of the chamber, and an output; a conduit having a first portion located between the first surface and the second surface to deliver the liquid nutrient solution to the soilless growth medium, and a second portion connected to the output of the pump; wherein the first surface includes an opening directed toward the sealed lower portion of the chamber to allow the liquid nutrient solution to flow from between the first surface and the second surface to the closed lower portion of the chamber. The use of automated controls and display panel parameters are old and notoriously well-known components of computerized and automated systems.

Claims 216-219, 221 and 223-233 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 21-40 of copending Application No. 11/653,121. Although the conflicting claims are not identical, they are not patentably distinct from each other because both claim sets teach subject matter of a chamber including an open upper portion and a closed lower portion for storing a liquid nutrient solution; a first surface covering the closed lower portion of the chamber; a second surface located above the first surface; a soilless growth medium supported by at least one of the first surface and the second surface, wherein

at least a portion of the soilless growth medium is located between the first surface and the second surface; and a pump located in the closed lower portion of the chamber, the pump including an input for receiving the liquid nutrient solution from the closed lower portion of the chamber, and an output; a conduit having a first portion located between the first surface and the second surface to deliver the liquid nutrient solution to the soilless growth medium, and a second portion connected to the output of the pump; wherein the first surface includes an opening directed toward the sealed lower portion of the chamber to allow the liquid nutrient solution to flow from between the first surface and the second surface to the closed lower portion of the chamber. The use of automated controls and display panel parameters are old and notoriously well-known components of computerized and automated systems.

Claims 216-219, 221, 223-233 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 21-40 of copending Application No. 11/455,364. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications teach self-contained plant growing system, comprising: a hydroponic gardening appliance comprising: a base sized and dimensioned to fit on a kitchen countertop, a chamber supported on the base, the chamber including an open upper portion and a closed lower portion for storing a liquid nutrient solution, a cover removably supported on the open upper portion of the chamber, the cover including an aperture adapted to support the seed cartridge above the closed lower portion of the chamber, an artificial light source suspended above the cover by a support, a controller located in the base.

The modification of a seed cartridge comprising: a rigid frame, a soilless growth medium supported by the frame, and a seed in contact with the soilless growth medium is an obvious modification known in the art for ease of transplanting.

The modification of the controller including a plurality of preprogrammed light source timing cycles for the artificial light source, wherein the plurality of preprogrammed light source timing cycles are designated for different seed types, and at least one of the preprogrammed light source timing cycles is designated for the seed of the seed cartridge; and a data entry panel associated with the controller, and including a user-operable input for selecting one of the preprogrammed light source timing cycles is merely an automation measure for efficient and precise operation.

Claims 216-219, 221 and 223-233 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-29 of copending Application No. 12/073,985. Although the conflicting claims are not identical, they are not patentably distinct from each other because both claim sets teach subject matter regarding a chamber including an open upper portion and a closed lower portion for storing a liquid nutrient solution; a first surface covering the closed lower portion of the chamber; a second surface; a soilless growth medium supported by at least one of the first surface and the second surface, wherein at least a portion of the soilless growth medium is located between the first surface and the second surface; and a pump located in the closed lower portion of the chamber, the pump including an input for receiving the liquid nutrient solution from the closed lower portion of the chamber, and an output; a conduit having a first portion located between the first surface and the

second surface to deliver the liquid nutrient solution to the soilless growth medium, and a second portion connected to the output of the pump; wherein the first surface includes an opening directed toward the sealed lower portion of the chamber to allow the liquid nutrient solution to flow from between the first surface and the second surface to the closed lower portion of the chamber.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 216, 217, 219, 221, 223 are rejected under 35 U.S.C. 103(a) as being unpatentable over United Kingdom Patent GB 2217165 A to Maruyama in view of U.S. Patent No. Des. 416, 102 to Schulman and U.S. Patent No. 5,555, 676 to Lund.

Regarding Claim 216 and 219, Maruyama teaches a self-contained, tabletop aeroponic or hydroponic garden, comprising: a chamber (Maruyama Fig. 1 #12), the chamber including an open upper portion and a sealed lower portion for storing a liquid nutrient solution (Maruyama Fig. 1 #14); a cover (Maruyama Fig. 1 #76) removably supported on the open upper portion of the chamber, the cover defining a plant opening (Maruyama Fig. 1 #78) adapted to support a plant (Maruyama Fig. 1 element P); and located in the sealed lower portion of the chamber the pump (Maruyama Fig. 1 #44) adapted to deliver the liquid nutrient solution to the plant opening in the cover; wherein the cover comprises an upper cover portion and a lower cover portion (Maruyama Fig. 1

#76 top surface is upper portion and #76 lower surface is bottom portion; applicant hasn't claimed a space between the upper and lower portion or any additional distinct structure of the upper and lower portion), and the plant opening extends through both the upper cover portion and the lower cover portion (Maruyama fig. 1 #78 extends from top surface of #76 to the bottom surface of #76), wherein the self-contained, tabletop aeroponic or hydroponic garden further comprises a bifurcated conduit extending from the pump to the plant opening for delivering the liquid nutrient solution to the plant opening, the bifurcated conduit including a first bifurcated conduit portion (Maruyama Fig. 1 #46 bottom portion below the pump or element #56, applicant hasn't claimed directly connected to the pump) connected to the pump, and a second bifurcated conduit portion extending between the upper cover portion and the lower cover portion to the plant opening (Maruyama Fig. 1 #46 top portion above the pump).

Maruyama is silent on a photoradiation hood supported above the cover by an adjustable support arm extending upward from the base, the photoradiation hood including an artificial light source; a base and the chamber supported on the base. However, Schulman teaches a photoradiation hood supported over a plant and having a base (Schulman Fig. 1 and 2) a chamber supported on the base (Schulman plant receptacle rests on the base). It would have been obvious to one of ordinary skill in the art to modify the teachings of Maruyama with the teachings of Schulman at the time of the invention to promote healthy plant development. The modification is merely the use of a known technique to improve a similar device in the same way. Maruyama as modified by Schulman teaches a controller (Schulman Fig. 1 and 2 the buttons and

switches at the base of the light) located on the base, the controller adapted to switch the artificial light source on and off on a timed light cycle (merely means “capable of” and Schulman is capable of this function, applicant has not claimed any structure to perform the function; applicant hasn’t claimed that the on and off is computer automated and manual flip of the switch satisfies the current claim language). Maruyama as modified teaches a support arm (Schulman Fig. 1 vertical member between light and base) supporting the artificial photoradiation source, the support arm having an adjustable height, wherein the artificial photoradiation source comprises a photoradiation hood (Schulman Fig. 1 portion covering the light bulb). Schulman appears to teach a telescoping support arm, but is silent on explicitly teaching adjustability. However, making something adjustable does not present a patentably distinct limitation over the prior art of record since it is merely an obvious engineering design choice to accommodate different size plants [*In re Stevens*, 212 F.2d 197, 198, 101 USPQ 284, 285 (CCPA 1954)].

Maruyama is silent on a power cord adapted to plug into a household outlet and provide power to at least one of the photoradiation hood, the controller, and the display panel. However, Lund teaches it is old and notoriously well-known to use a power cord in a hydroponic device to send power to the controller and display panel (Lund Fig. 1 #53). It would have been obvious to one of ordinary skill in the art to modify the teachings of Maruyama with the teachings of Lund at the time of the invention as a cost efficient energy source. The modification is the application of a known technique to a known device ready for improvement to yield predictable results.

Maruyama is silent on a display panel located on the base, the display panel being in communication with the controller, wherein the display panel includes an add nutrient indicator that operates on a timed nutrient cycle. However, Lund teaches a display panel in communication with a controller and the display panel includes an add nutrient indicator and operates on a timed nutrient cycle (Lund Col. 4 line 53-67; examiner considers water to be a nutrient and Fig. 1 #56, 54, 50, 51, 52). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Maruyama at the time of the invention for ergonomic ease of operation and control and for efficient and precise operation. The modification is merely the application of a known technique to a known device ready for improvement to yield predictable results. Merely shifting the location of the display panel performing the same intended function does not present a patentably distinct limitation over the prior art of record [*In re Japikse*, 181 F.2d 1019, 1023, 86 USPQ 70, 73 (CCPA 1950)].

Regarding Claim 217, Maruyama as modified teaches further comprising: a liquid level sensor located within the chamber; and an add liquid indicator located on the display panel, wherein the add liquid indicator is adapted to activate when the liquid level sensor detects that the liquid nutrient solution in the sealed lower portion of the chamber drops below a predetermined level (Lund Col. 4 line 53-67).

Regarding Claim 221, Maruyama as modified teaches a controller adapted to switch the pump on and off (Maruyama is "capable of" and Lund Col. 4 line 53-67).

Regarding Claim 223, Maruyama teaches it is designed to be used in the home (Maruyama page 1 line 3), but is silent on explicitly teaching the soilless garden is sized

and dimensioned for use on a kitchen countertop. However, applicant hasn't claimed a counter top dimension size so it could be viewed that Maruyama is inherently capable of being used on a countertop. Furthermore, a modification in size performing the same intended function is merely an engineering design choice for efficient use of space that does not overcome the teachings of the prior art of record [*In re Rose*, 220 F.2d 459, 463, 105 USPQ 237, 240 (CCPA 1955)].

Claims 224 and 233 are rejected under 35 U.S.C. 103(a) as being unpatentable over United Kingdom Patent GB 2217165 A to Maruyama in view of U.S. Patent No. Des. 416, 102 to Schulman and U.S. Patent No. 5,555, 676 to Lund as applied to claim 216 above, and further in view of U.S. Patent Pub. No. 2002/0184820 to Mauney.

Regarding Claims 224 and 233, Maruyama as modified is silent on a door connected to the cover. However, Mauney teaches a hydroponic plant chamber with a door in the cover of the chamber (Mauney #65). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Maruyama with the teachings of Mauney at the time of the invention for ease of access to the chamber as taught by Mauney. The modification is merely the application of a known technique to a known device ready for improvement to yield predictable results.

Maruyama as modified teaches a seed cartridge supported by the plant opening (Maruyama Fig. 1 #80 and page11 line 32).

Claims 225-228, 230, 231, 232 are rejected under 35 U.S.C. 103(a) as being unpatentable over United Kingdom Patent GB 2217165 A to Maruyama in view of U.S. Patent No. Des. 416, 102 to Schulman and U.S. Patent No. 5,555, 676 to Lund as applied to claim 216 above, and further in view of U.S. Patent No. 4,584,791 to Wolf and U.S. Patent No. 4,403,443 to Valente.

Regarding Claims 225 and 232, Maruyama as modified teaches the hydrophilic cellular substrate comprises a material selected from the group consisting of: peat moss, foam, sponge, and polymer (Maruyama #80 polymer "urethane" page 8 line 34). Maruyama as modified is silent on the seed cartridge structure. However, Wolf teaches a net basket including an upper support rim (Wolf Fig. 4C #45) adapted to support the seed cartridge within the plant opening, a plurality of substantially vertical ribs (Wolf Fig. 4C #43) extending downward from the upper support rim, each substantially vertical rib defining a substantially vertical channel, and a lower ring (Wolf Fig. 4A and 4C the lower ring is the circular base of the cartridge) connected to the plurality of substantially vertical ribs, the lower ring including a central opening, wherein adjacent pairs of the substantially vertical ribs define a window therebetween. It would have been obvious to one of ordinary skill in the art to further modify the teachings of Maruyama with the teachings of Wolf at the time of the invention for use with root crops as taught by Wolf (Wolf Col. 6 line 57-58). The modification is merely the application of a known technique to a known device ready for improvement to yield predictable results.

Maruyama as modified is silent on a seal located over the upper support rim of the net basket, the seal defining a central aperture and a plurality of substantially radial

slits extending outwardly from the central aperture. However, Valente teaches a seal defining a central aperture and a plurality of substantially radial slits extending outwardly from the central aperture (Valente #7 and 9) that fits over the rim of a plant container. It would have been obvious to one of ordinary skill in the art to modify the teachings of Maruyama with the teachings of Valente at the time of the invention to prevent spillage and contamination as taught by Valente (Valente abstract). The modification is merely the use of a known technique to improve a similar device in the same way.

Regarding Claim 226, Maruyama as modified teaches the lower ring of the net basket defines a substantially horizontal channel located interior to the net basket (Wolf the combination of the bottom that has apertures and it meets the sidewall creates a horizontal channel).

Regarding Claim 227, Maruyama as modified teaches the substantially vertical channels defined by the substantially vertical ribs are located interior to the net basket (Wolf Fig. 4C the vertical members allow water to run down then thus act as channels and the surface of the vertical members does face i.e. is located in the interior).

Regarding Claim 228, Maruyama as modified teaches each window includes an upper border and a lower border, and the upper border is located at a greater vertical distance from the upper support rim than the lower border is from the lower ring (Wolf Fig. 4c teaches horizontal rings that pass around the sides, these rings create the upper and lower borders).

Regarding Claim 230, Maruyama as modified teaches the seal is opaque (Valente Fig.1 #5 shows the seal is not clear).

Regarding Claim 231, Maruyama as modified is silent on the seal includes labeling. However, it would have been obvious to one of ordinary skill in the art to further modify the teachings of Maruyama at the time of the invention since the modification is merely an aesthetic design choice to increase consumer appeal and does not present a patentably distinct limitation over the prior art of record [*In re Seid*, 161 F.2d 229, 231, 73 USPQ 431, 433 (CCPA 1947)].

Claims 229 is rejected under 35 U.S.C. 103(a) as being unpatentable over United Kingdom Patent GB 2217165 A to Maruyama in view of U.S. Patent No. Des. 416, 102 to Schulman and U.S. Patent No. 5,555, 676 to Lund, and further in view of U.S. Patent No. 4,584,791 to Wolf and U.S. Patent No. 4,403,443 to Valente as applied to claim 216 and 225 above, further in view of U.S. Patent No. 4,976,064 to Young et al.

Regarding Claim 229, Maruyama as modified is silent on placing a germination cap over the seed cartridge. However, Young teaches a germination cap over the seed cartridge (Young #12). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Maruyama with the teachings of Young at the time of the invention to prevent biological contamination as taught by Young. The modification is the application of a known technique to a known device ready for improvement to yield predictable results.

Response to Arguments

Applicant's arguments filed 31 August 2009 have been fully considered but they are not persuasive.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies are not recited explicitly in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Applicant argues that the prior art of record does not teach a device that includes a cover that comprises a bifurcated conduit portion extending between the upper cover portion and the lower cover portion to the plant opening.

However, the exact claim language applicant is referring to is “**a second bifurcated conduit portion extending between the upper cover portion and the lower cover portion to the plant opening.**” The examiner maintains that the structure of Maruyama satisfies this limitation. Maruyama #76 is the cover with the plant opening #78. Fig. 1 and Fig. 7 teach that the liquid comes out at #52 which is the second portion of the bifurcated conduit. It is the examiner's position that this portion of the conduit is between the upper and lower cover portion since as per Fig. 1 and 7 the top end of the conduit is above the top cover and the lower portion connected to the pump is below the lower cover portions thus making the conduit between the upper and lower cover portions.

The current claim language does not structurally define the relationship of the conduit and the plant opening. It does not claim that the conduit is within the plant opening in order to deliver the liquid nor does it claim that the liquid is delivered directly

between the upper and lower cover. The claim merely states functional feature of delivering liquid to the plant opening.

The examiner maintains that applicant hasn't patentably distinguished over the prior art of record.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **ANDREA M. VALENTI** whose telephone number is (571)272-6895. The examiner can normally be reached on 6:00am-4:30pm M-Th.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Andrea M. Valenti/
Primary Examiner, Art Unit 3643

22 November 2009